80-1024

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

HUEY P. NEWTON,

Petitioner,

against

STATE OF CALIFORNIA,

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit the State of California from imposing criminal liability on Petitioner where there was no notice or fair warning that he was an ex-felon and, thereby, that his possession of a firearm was within the proscription of Calif. Pen. C. § 12021.

II. Whether the principles of double jeopardy and due process contained in the Fifth and Fourteenth Amendments to the United States Constitution prohibit the State of California from imposing criminal liability upon Petitioner for possession of a firearm by an ex-felon where a final and unappealed ruling by a California state court had struck the previous conviction as having been unconstitutionally obtained and a subsequent state court followed this prior determination of unconstitutionality.

III. Whether Section 9 and 10 of Article I of the United States Constitution proscribing prosecution under an *ex post facto* law prohibit the State of California from relying upon *Faretta* v. *California,* 422 U.S. 806 (1975) or *Lewis* v. *United States,* —— U.S. ——, 100 S.Ct. 915 (1980), to justify imposition of criminal liability upon Petitioner.

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No. .....

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HUEY P. NEWTON,

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ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Michael Kennedy, on behalf of Petitioner Huey P. Newton, prays that a Writ of Certiorari issue to review an October 22, 1980 decision of the Supreme Court of the State of California, denying a Petition for Hearing of a decision of the California Court of Appeal, First Appellate District, Division Three, affirming a judgment of conviction.

Opinions Below

The unpublished opinion of the Court of Appeal affirming Petitioner's conviction with one Justice dissenting is attached hereto at Appendix C. Rehearing by the Court of Appeal was denied. (Appendix D). The denial of a hearing by the California Supreme Court, with three justices dissenting—Chief Justice Bird and Justices Mosk

and Newman—appears at Appendix E. The original judgment of conviction in the Superior Court of the State of California, Alameda County, appears at Appendices A and B.

Jurisdiction

The opinion of the Court of Appeal was filed on July 28, 1980. A timely Petition for Rehearing was thereafter denied and a Petition for Hearing to the California Supreme Court was denied on October 22, 1980.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Statutes, Federal Rules and Regulations Involved

§ 12021 of the California Penal Code provides:

> [Possession of certain firearms by felons and narcotic addicts: Punishment]
>
> (a) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or who is addicted to the use of any narcotic drug, who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense, and shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year or by a fine not exceeding five hundred dollars ($500) or by both.
>
> (b) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless:
>
> (1) Conviction of a like offense under California law can only result in imposition of felony punishment; or

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both such punishments.

Statement of the Case

This case concerns an individual who has frequently been in dispute with the State, Huey P. Newton, founder and principal spokesperson for the Black Panther Party. However, the controversy that has surrounded Newton and the Party for the past fifteen years does not envelope the facts as presented by the parties to this dispute.

On Sepember 29, 1978, Newton was acquitted by jury of assault with a deadly weapon (Pen. C. § 245) but convicted for being a felon in possession of two handguns found in his house (Pen. C. § 12021). Such possession is lawful in California unless the possessor is a convicted felon. He was sentenced to two years in prison for this status crime.

Newton did not, and could not, have known he was an ex-felon at the time (1974) he possessed these guns because his lone previous felony conviction (1964) had been struck as unconstitutionally obtained. Further, the State's own actions caused Newton to believe he was not an ex-felon. Consequently, Newton did not have the requisite intent or *mens rea* to violate Pen. C. § 12021.

The basis of Newton's position that he was not an ex-felon is a November 1971 order of the Alameda County (California) Superior Court striking his 1964 felony conviction. The conviction was struck on the ground that "the required standard for inquiry by the trial court into this defendant's ability to defend himself and his understanding of the nature and consequences of his waiver of counsel was not met at the 1964 trial." [C.T. 932,* Order

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* C.T. refers to "Clerk's Transcript," or the record of docket entries below.

of Superior Court Judge Lyle E. Cook, p. 2.] That order was not appealed by the prosecution, although it was appealable. There was no contrary determination by any court thereafter of Newton's status as an alleged ex-felon from which he could appeal until the conviction challenged herein.

Again, in August of 1978, Newton was arrested and again charged with possession of a firearm by an ex-felon. This charge was dismissed by Judge Kelsay of the Municipal Court, Santa Cruz (California), *who found Judge Cook's earlier ruling to be controlling.*

The State of California was party to each of these judicial pronouncements that Newton is not an ex-felon and chose not to appeal. Numerous other actions of the State of California led him to believe that he was not an ex-felon for purposes of § 12021: In 1972, Newton was charged in Alameda County with exhibiting a pistol. He was *not* charged with being an ex-felon in possession of a firearm. Again in 1974 he was charged in Alameda County with assault with a firearm. Though a co-defendant was charged under § 12021, Petitioner was *not.* Finally, with respect to the offense alleged in the instant matter, he was not charged under § 12021. It was not until 1977—following the decision of *Faretta* v. *California,* 422 U.S. 806 (1975)—that the State decided § 12021 was applicable and amended its complaint.

Additionally, the California Commission of Voters accepted Mr. Newton's registration in 1971 and permitted him to cast his ballot regularly thereafter (C.T. 866; R.T.* 1228); in March of 1972, Mr. Newton attempted to visit an inmate at the California (Correctional) Medical Facility at Vacaville. Though he was initially excluded because the Superintendent believed him to be an ex-felon,

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* R.T. refers to "Reporter's Transcript," or minutes of the proceedings below.

upon receipt of a copy of Judge Cook's decision, the visit was permitted (*id.*). Charles Garry, a certified criminal law specialist and Petitioner's counsel in 1971, assured him that he was no longer a person convicted of a felony and therefore had a right to possess a gun as well as enjoy other privileges afforded nonfelons (R.T. 1222, 1228).

Nevertheless, the trial court refused judicial notice of the 1971 court proceeding wherein the conviction was struck, finding it irrelevant (R.T. 313), and foreclosed further evidence on the matter.

On review, the Court of Appeal held that Petitioner was a prior felon and that mistake or lack of knowledge did not constitute a defense to § 12021. Thus, Petitioner finds himself convicted of an offense which he not only had no intent to commit, but was actually lulled into believing was permissible by the State's own actions. Such a conviction cannot stand.

The Federal Questions Raised Below

The basic Constitutional issues presented by this case—whether the Fifth and Fourteenth Amendments prohibit (1) conviction of an offense where there is no proof of criminal intent and indeed, the State has affirmatively fostered the belief that Petitioner's actions would not be unlawful, and (2) the retroactive application of new law to Petitioner's prior behavior—have been raised in every court proceeding below.

The first point, including discussion of collateral estoppel, was raised before the District Court of Appeal (Appellant's Brief at Pt. II), and before the California Supreme Court (Appellant's Brief at Pts. I and II, Amicus Brief at Pts. I and II).

When the trial court specifically relied upon a retroactive application of *Faretta* v. *California, supra,* to revive

Petitioner's previously struck felony conviction (R.T. 5-8, 11-15, 26), this violation of the Fifth and Fourteneth Amendments was raised before the Court of Appeal (Appellant's Brief, Pt. II) and before the California Supreme Court (Appellant's Brief at Pt. II, Amicus Brief at Pt. I).

ARGUMENT

I. The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit the State of California from imposing criminal liability on Petitioner where there was no notice or fair warning that he was an ex-felon and, thereby, that his possession of a firearm was within the proscription of Calif. Pen. C. § 12021.

Advance notice and fair warning that particular conduct is proscribed by a criminal statute is the very essence of due process of law under the Fifth and Fourteenth Amendments. *Marks* v. *United States,* 430 U.S. 188 (1977), *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972), 379 U.S. 559 (1964), *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964), *Lambert* v. *California,* 355 U.S. 225 (1957). In the instant case, Petitioner did not know and could not have known, even after exercising the utmost care, that California Penal Code §12021 prohibited his possession of a gun in his home for his protection and the protection of his family.

It is often said, of course, that "ignorance of the law is no excuse," *United States* v. *Balint,* 258 U.S. 250 (1921), *Shelvin-Carpenter Co.* v. *State of Minnesota,* 218 U.S. 57 (1908). The rigorous application of this rule, however, without concern for an individual's actual knowledge within the circumstances of the offense, has generally been limited to those statutes which are part of low-penalty regulatory schemes defining offenses without reference to or requirement of a culpable mental state, *United States* v. *Dotter-*

weich, 320 U.S. 277 (1943), or "under circumstances that should alert the doer to the consequences of his deed." *Lambert* v. *California, supra* at 228.

This is so because the deterrent purpose of the criminal law necessarily affording the opportunity for one to conform his conduct to known and articulable standards is otherwise frustrated.

We are in this case presented with an individual who by all indications was not an ex-felon for purposes of the prohibition of possession of a firearm in one's own home:* two judicial proceedings, one where his prior felony conviction was rendered nugatory and a second where the court believed itself bound by the prior ruling, numerous pleadings by the State all of which failed to allege that he was an ex-felon, and the continuation of the benefits and privileges enjoyed by all non-felons. Yet he was convicted of it, without proof of any knowledge or wrongful intent.

Though this Court has held that it will defer the question of whether a *mens rea* is constitutionally required for every offense, *Powell* v. *Texas,* 392 U.S. 514, 543 (1968), the fact is that California does ascribe a particular mental state to the offense. *Mens rea* is embedded in the foundations of the California Penal Code. Section 20 tell us that in every crime there must exist a union of act and intent. Section 26 excepts from the class of persons capable of committing crimes those who have "committed the act . . . through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." Sub-

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* The majority opinion of District Court of Appeal, Appendix C, notes purposes for which a prior conviction which has been stricken under the California procedure for doing so. *People* v. *Coffey,* 67 Cal.2d 204 (1967), may be used. (Appendix C at been stricken under the California procedure for doing so, *People* p. 7a). Whatever the State of California law in consideration of *Lewis* v. *United States,* —— U.S. ——, 100 S.Ct. 915 (1980), will be in 1974 a conviction struck by the *Coffey* procedure could not be used in this context or for this purpose.

section 4 of the same section exempts from the Penal Code's strictures those "who committed the act . . . under an ignorance or mistake of fact, which disproves criminal intent."

There is, therefore, no liability for behavior forbidden by the Penal Code when the act is unaccompanied by a wrongful intent unless the statutory language itself removes the provision from the ambit of Sections 20 and 26. Under the Penal Code, there is no liability without fault unless an expression of legislative intent ineluctably requires a different construction. And it has been specifically held that § 12021 requires proof of wrongful intent. *People* v. *Bray,* 52 Cal. App. 3d 494 (1975).

Thus, the conviction of Petitioner was obtained with no notice to him that his conduct was proscribed, affirmative acts by the State to lead him to believe that his conduct would be permitted, and finally with no requirement of proof of intent despite California's requirement of such.

Indeed, the conviction affronts the very intent of the Due Process clause. Every governmental agency reinforced his belief that he was not a convicted felon. To hold him criminally responsible "would be to sanction an indefensible sort of entrapment by the state—convicting a citizen for exercising a privilege which the state had clearly told him was available to him . . . The Due Process Clause does not permit conviction to be obtained under such circumstances." *Cox* v. *Louisiana,* 379 U.S. 559, 571 (1968). And one of those governmental agencies was a court of law. "It would be an act of 'intolerable injustice' to hold criminally liable a person who has engaged in certain conduct in reasonable reliance upon a judicial opinion instructing that such conduct is legal. Indeed, the reliance defense is required by the constitutional guarantee of due process . . ." *Kratz* v. *Kratz,* 477 F. Supp. 463, 481 (E.D. Pa. 1979); and see *Foster* v. *Barbour,* 462 F. Supp. 582, 588-589 (W.D. N. Carolina 1978).

II. The principles of double jeopardy and due process contained in the Fifth and Fourteenth Amendments to the United States Constitution prohibit the State of California from imposing criminal liability upon Petitioner for possession of a firearm by an ex-felon where a final and unappealed ruling by a California state court had struck the previous conviction as having been unconstitutionally obtained and a subsequent state court followed this prior determination of unconstitutionality.

It is Petitioner's contention that the State of California must be collaterally estopped from asserting that he is a prior felon for purposes of § 12021 since it has fully litigated the question previously and has had the matter resolved against it. He contends further that the doctrine of collaterial estoppel* in the instant context is of constitutional dimensions under the aegis of the Fifth Amendment's prohibition of double jeopardy, or, in the alternative, a requirement of due process in the administration of justice.

The doctrine of collateral estoppel has its roots in the civil law, but it is no newcomer to criminal litigation. In fact, it is older than the Republic. In *Rex* v. *Duchess of Kingston,* 20 How. St. Tr. 355, 583 (1776), a conviction in the Ecclesiastical Court for sexual misconduct was held to bar prosecution for bigamy in another court. And Justice Holmes thought it preposterous to confine col-

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* " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in an adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970). See also *Parklane Hosiery* v. *Shore,* 439 U.S. 322 (1979), *Montana* v. *United States,* —— U.S. ——, 99 S.Ct. 970, 974 (1979).

lateral estoppel to civil cases, saying so for a unanimous court in *United States* v. *Oppenheimer,* 242 U.S. 85, 87 (1916): "It cannot be that the safeguards of the person, so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." This Court's two most recent pronouncements, *Allen* v. *McCurry,* —— U.S. ——, 101 St.Ct. ——, 28 Cr. L. 3009 (December 9, 1980) and *United States* v. *Di Francesco,* —— U.S. ——, 101 S.Ct. ——, 28 Cr.L. 3017 (December 9, 1980) will surely erode any lingering doubt.* Indeed, collateral estoppel, a cognate of the constitutional protection against double jeopardy, has since been recognized, in some of its aspects and in certain contexts, as a doctrine of constitutional dimensions. *Ashe* v. *Swenson, supra.***

The roots and purposes of the double jeopardy clause are synonymous with the Petitioner's concerns here. The Fifth Amendment's protection from being twice put in jeopardy for the same offense has, as "'a' or 'the'" primary purpose . . . [the] preser[vation] [of] the finality of judgments, *Crist v. Bretz,* 437 U.S. 28, 33 (1978)," *United States* v. *Di Francesco,* supra 28 Cr.L.at 3020. Petitioner can think of no circumstance under which the finality of judgments is less respected than those herein involved.

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* This Court's reluctance to apply collateral estoppel in a recent criminal case was largely based upon a determination that the government there had not had a full and fair opportunity to litigate the questions involved. *Standifer* v. *United States,* —— U.S. ——, 100 S. Ct. 1999, 2007 (1980). This, of course, has always been a requirement for the application of collateral estoppel.

** "The ultimate question to be determined, then . . . is whether this established rule of federal law [collateral estoppel] is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is." In a footnote to this holding the Court goes on: "It is true . . . that we have never squarely held collateral estoppel to be a constitutional requirement . . . [However] [t]he federal courts soon recognized the need to prevent [unfair and abusive repercussions] through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law," 397 U.S. at 445.

The State wishes to relitigate again and again the question of the validity of Petitioner's 1964 conviction, and it wishes to do so in light of current standards.

No case cries out more for a rule of finality. The State of California had a full and fair opportunity to investigate the legality of Petitioner's prior conviction. Indeed, the hearing transcript with respect to that issue consumed 116 pages (App. C at 13a). The ruling of Judge Cook could have been appealed, *People* v. *Davis,* 94 Cal. App. 3d 215 (1979). The State chose not to do so.* Again in 1978, Judge Kelsay's ruling could have been appealed. It was not. Under no theory of judicial economy or fairness should the State have been permitted "another bite at the apple." The doctrine of collateral estoppel as expressed in *Ashe v. Swenson* should be applied.

III. Sections 9 and 10 of Article I of the United States Constitution proscribing prosecution under an *ex post facto* law prohibit the State of California from relying upon *Faretta* v. *California,* 422 U.S. 806 (1975) or *Lewis* v. *United States,* —— U.S. ——, 100 S.Ct. 915 (1980), to justify imposition of criminal liability upon Petitioner.

Sections 9 and 10 of Article I of the Constitution prohibit Congress from passing an *ex post facto* law. This has been defined by the Supreme Court as a law "that makes an action done [innocently] before the passing of

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* The requirement that a party dissatisfied with a judgment attack it directly, by appeal, and not shop around for a more congenial judge is not simply hornbook law, it is the hornbook's crossbow. Professor Scott, co-reporter with Professor Seavey of the Restatement of Judgments, put it squarely: "Where a judgment is rendered against a party and he does not carry the case to a higher court, the judgment is conclusive in subsequent controversies between the parties as to matters actually litigated and determined, even though the judgment was erroneous." Scott, "Collateral Estoppel By Judgment," 56 *Harv. L. Rev.* 1, 15 (1942); and see *United States* v. *Moser,* 266 U.S. 236, 242 (1924).

the law,... criminal... [or] that aggravates a crime or makes it greater than it was, when committed." *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 390 (1798). Stated otherwise, "No one can be criminally punished in this country, except according to a law prescribed for his government by the soverign authority before the imputed offense was committed, and which existed as a law at the time," *Kring v. Missouri,* 107 U.S. 221, 235 (1883). This is so because a defendant is entitled to know the standards for his behavior prior to his embarking on a particular course of action. *Watkins v. United States,* 354 U.S. 178 (1954).

It is Petitioner's contention that the *post haec* evaluation of the prior conviction under the standards of *Faretta, supra,* and *Lewis, supra,* works to punish him for an offense not unlawful at the time it was committed but one made so by subsequent judicial decisions. See *Bouie v. City of Columbia, supra.*

The 1975 decision of *Faretta v. California* transformed the law governing a defendant's waiver of counsel. Under the standards of *Faretta,* Petitioner's conviction, ruled unconstitutional in 1971, may have been valid. As such, the intervening case led the State to seek re-litigation of the validity of the 1964 conviction when the 1974 arrest was finally prosecuted in 1978.

By no view of the *ex post facto* prohibition could Petitioner's 1964 conviction be re-vitalized and re-evaluated in light of new standards, however, for to do so would require at the least, that Petitioner conform his behavior in 1974 to standards devised in 1975, the date of the *Faretta v. California* decision.

This situation is even more desperate than the one in *Bouie.* There, appellants were tried under a judicial broadening of a statute which had not been considered to include their behavior when performed. There this Court found the *ex post facto* clause a bar to prosecution. Here, a subsequent decision affected the prior ruling of the

validity of an underlying conviction, the consequence of which was to affect yet another statute. Such a procedure cannot comport with due process.

A similar analysis is required with respect to the District Court of Appeal's reliance on *Lewis*. There this Court ruled that for purposes of Title 18 U.S.C. App. § 1202(a)(2), a federal statute prohibiting possession of a firearm by a convicted felon, the underlying conviction could not be collaterally attacked as a defense to prosecution.

First, since the case construes only a particular federal law, it cannot in any way affect Petitioner's position. With respect to Petitioner's *ex post facto* claim, however, it is apparent from the face of the District Court of Appeal decision that it simply abandoned applicable California state law in light of *Lewis*. Petitioner's behavior in 1974 can only be expected to conform to what was required of him in 1974, not what may soon be required of him in light of a 1980 decision of this Court.*

As such, this Court should issue a writ of certiorari to review the California court's actions.

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* Indeed, *Lewis* supports Petitioner's position totally. There this Court did not hold that prior convictions obtained in violation of *Gideon* v. *Wainright*, 372 U.S. 335 (1963), may be used for all purposes, and in no way diluted the important rights enunciated therein. It held instead that an individual cannot ignore a prior conviction because he believes it to be unconstitutional without availing hifself of procedures for striking the unlawful conviction. 100 S.Ct. at 920. Here, Newton did just that. See footnote, *supra* at p. 7. Prior to the conduct prosecuted in the instant action, the Respondent litigated the legality of the prior conviction and the court found that his Sixth Amendment right to counsel had been violated . Unlike in *Lewis*, Petitioner did not ignore this status but sought to regularize it, as *Lewis* suggests. There is no more he could have done to vindictate his rights under *Wainright*.

CONCLUSION

For all of the reasons stated above, a writ of certiorari should issue and the conviction should be reversed.

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Appendix A, Verdict of Jury, People v. Newton, Superior Court, Alameda County (California).

Superior Court of The State of California
In And for The County of Alameda

Dept. No. 122 Action No. 65474

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff

v.

HUEY PERCY NEWTON

Defendant

Verdict of Jury.

We, the jury in the above entitled cause, find the defendant, Huey Percy Newton, GUILTY of the crime of a felony, to wit, a violation of Section 12021 of the Penal Code of California in that on or about the 16th day of August, 1974, in the County of Alameda, State of California, said defendant, having been convicted of a felony, did then and there have in his possession and under his custody and control a firearm, to wit, a handgun, capable of being concealed upon the person, as charged in count three of the Information.

FILED

SEP 29 1978

RENE C. DAVIDSON, County Clerk

By Melissa L. Fowler, Deputy

Melissa L. Fowler

Dated: 9/26/78

..... Foreperson

Appendix B, Execution of Sentence, People v. Newton, Superior Court, Alameda County (California).

Execution of Sentence.

DEPT. 10

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Date: Nov. 7, 1979

Hon. JOSEPH KARESH, Judge

Melissa Fowler, Deputy Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff

vs.

HUEY PERCY NEWTON

Defendant

Counsel appearing for Plaintiff

Thomas J. Orloff, Deputy District Attorney

Counsel appearing for Defendant

Michael Kennedy, Esq. and Paul Harris, Esq.

NATURE OF PROCEEDINGS: EXECUTION OF SENTENCE

ACTION No. 65474

Defendant is present.

The defendant having ben convicted on Sept. 29, 1978 by

( ) plea of guilty

( ) decision of Court

(X) verdict of jury

of the offenses of felonies, to wit, violations of Section 12021 of the Penal Code of California as charged in

Execution of Sentence.

courts two and three (originally numbered as counts four and five respectively) of the Information.

The defendant's motion for probation is by the Court denied.

The Court further orders the defendant's motion for bail pending appeal having been granted on November 3, 1979, the defendant shall remain free on said bail in the amount of $50,000.00

The defendant is arraigned for sentence and has no legal cause to show why the judgment of this Court should not be pronounced against him. The Court pronounces judgment.

Defendant has been held in custody for 58 days as a result of the same criminal act or acts for which he has been convicted.

It is ORDERED that said defendant be punished by imprisonment in state prison of the State of California for the term provided by law.

It is further ORDERED that sentences shall be served in respect to one another as follows:

That the terms of imprisonment imposed as to count two (originally numbered as count four) shall commence to run immediately and concurrently with the term of imprisonment imposed as to count three (originally numbered as count five).

and in respect to any prior incompleted sentence(s) as follows:

The Court makes no order.

it is further ORDERED that the defendant is remanded to the custody of the Sheriff of the County of Alameda to be by him delivered to the Director of Corrections of the State of California at California Medical Facility, Vacaville, California.

Appendix C, Opinion, People v. Newton, California Court of Appeal.

Opinion and Order.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Rspondent,

vs.

HUEY P. NEWTON,

Defendant and Appellant.

Defendant and appellant Huey P. Newton was charged with a violation of Penal Code section 245, subdivision (a) (assault with a deadly weapon) and with two counts of violating Penal Code section 12021 (possession of a firearm by a felon). It was further alleged that appellant had suffered a prior felony conviction in October of 1964.[1] A jury found appellant not guilty of a violation of Penal Code section 245, but did find him guilty of two counts of violating Penal Code section 12021. The court denied probation and sentenced appellant to state prison for two years.

The prosecutor contended that appellant on August 16, 1974, beat Preston Callins, a tailor, with a pistol after the tailor had referred to appellant as "baby." Since appellant was acquitted of the 245 charge, it is unnecessary to go into the facts surrounding this alleged incident. When

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[1] The 1964 conviction is the underlying felony of 12021 offenses.

appellant's apartment was searched pursuant to a search warrant on August 17, 1974, a Colt Commander .45 caliber semi-automatic handgun was found in a kitchen drawer. A loaded Colt Python .357 magnum revolver was discovered in the master bath.

On October 8, 1964, appellant was convicted in the Superior Court of Alameda County of assault with a deadly weapon.[2] (Pen. Code § 245.) Appellant was not represented by counsel at the jury trial leading to said conviction. On the morning of the commencement of said trial, the following colloquy took place between the trial judge and appellant: "THE COURT: . . . I will state to you at this time that you are entitled to be represented by an attorney. You have been advised by the Court on at least one other occasion at the time your cause was set for trial that you were entitled to that right, but I take it you wish to go on without the presence or the assistance of counsel; is that correct?

"MR. NEWTON: Well, if possible I would like to have a legal adviser, but I would like to speak for myself.

"THE COURT: All right. You are asking me, in effect, I take it, to appoint the Public Defender to act as your legal adviser?

"MR. NEWTON: Yes.

"THE COURT: But not to represent you?

"MR. NEWTON: Yes.

"THE COURT: Your request is denied."

In 1967, appellant was again charged with three felonies in the Superior Court of Alameda County. It was alleged in the indictment that appellant had in 1964 been convicted of assault with a deadly weapon. (*People* v. *Newton* (1970) 8 Cal.App.3d 359, 366.) Prior to trial in the 1967 action,

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[2] This conviction was affirmed on appeal.

appellant moved to strike the prior conviction from the indictment upon the "ground that his waiver of counsel in the 1964 proceedings had been ineffective." (*People* v. *Newton, supra,* at p. 386.) "The trial court read into the record the full appellate court decision in which the prior conviction was affirmed in 1965; stated that the appellate court therein considered all of defendant's current contentions; and denied his motion without an evidentiary hearing." (*Id.*) Appellant was convicted of voluntary manslaughter and appealed. On appeal, this court (Division Four) held that it was error to deny appellant's motion to strike without an evidentiary hearing. (*Id.,* at pp. 386-387.) Appellant's conviction was reversed and the case was remanded to the superior court.

Before the 1967 matter was retried appellant again moved to strike the 1964 conviction. A hearing was held on July 1, 1971; Judge Harold Hove of the Superior Court of Alameda County denied the motion to strike. Appellant was retried, resulting in a mistrial. Prior to his third trial on the 1967 matter, appellant again moved to strike his 1964 conviction. On November 5, 1971, Judge Lyle Cook of the Superior Court of Alameda County granted the motion to strike on the ground that appellant had not made an effective waiver of his right to counsel in the 1964 trial.

In 1974, appellant was charged with assault and possession of a gun by a felon (Pen. Code § 12021) in the County of Santa Cruz. On July 13, 1978, Judge William M. Kelsay of the Municipal Court of Santa Cruz County dismissed the gun charge at the preliminary hearing on the ground that the 1964 prior felony conviction was unconstitutional.[3]

In January and July of 1978, appellant made motions to strike the allegation of the prior felony conviction in the

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[3] All other charges were dismissed for insufficient evidence.

instant case. On August 16, 1978, Judge Martin Pulich heard the motion to strike and denied the motion. Appellant contends Judge Pulich was compelled to strike his prior conviction because the earlier rulings of Judge Cook and Kelsay are res judicata on the issue of the validity of the 1964 conviction.[4]

We reject appellant's contentions as the doctrine of res judicata is simply not applicable to the fact situation presented in the instant case. "[A] court order finding a prior conviction to be constitutionally invalid and striking the alleged prior conviction from the accusatory pleading in a pending criminal proceeding does not have the effect of wiping out the prior judgment of conviction...." (*Gonzalez* v. *Municipal Court* (1973) 32 Cal.App.3d 706, 711.) The granting of a motion to strike a prior conviction merely prevents the prior from being used by the court to enhance the punishment imposed in that particular proceeding. (*People* v. *Burke* (1956) 47 Cal.2d 45, 51.) Accordingly, at the time appellant possessed the guns in question here he was still a convicted felon.

Under appellant's argument Judge Pulich was bound to find the 1964 conviction constitutionally invalid because of the earlier rulings of Judges Cook and Kelsay. However, this argument presupposes that a defendant charged with a violation of Penal Code section 12021 may raise as a defense the validity of the underlying prior felony conviction. A defendant may not raise such a defense. "Appellant's status at the time he possessed the gun is the critical issue." (*People* v. *Loomis* (1965) 231 Cal.App.2d 594, 597; see also *Lewis* v. *United States* (1980) —— U.S. ——, 63 L.Ed.2d 198, 100 S.Ct. 915.) As noted earlier, at the time

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[4] Appellant states he is using the term res judicata in its broad sense and he is specifically relying on the doctrine of collateral estoppel.

appellant possessed the guns he was a convicted felon as the striking of the prior by Judge Cook was not the equivalent of a determination that appellant did not in fact suffer the conviction.

Appellant also contends before this court that his 1964 conviction is constitutionally invalid. But it is unnecessary for this court to address this issue because as noted above the invalidity of the prior may not be attacked after the possession has occurred.

Appellant contends that the trial court erroneously declined to judicially notice certain court records reflecting Judge Cook's 1971 order striking his prior felony conviction. Appellant claims this refusal "foreclosed any possibility" of establishing a mistake of fact defense based on appellant's supposed ignorance of his status as a felon and thus "sealed" his conviction.

However, no mistake of fact defense was open to appellant. Appellant relies upon *People* v. *Bray* (1975) 52 Cal.App. 3d 494, for the proposition that mistake of fact is a defense to a Penal Code section 12021 charge. We have no quarrel with *Bray*. In *Bray*, defendant did not know whether he had been convicted of a felony (accessory after the fact) under Kansas law and even the prosecutor claimed difficulty in knowing whether it was a felony. Defendant in *Bray*, on more than one occasion, had been led to believe by state regulatory agencies that he had not been convicted of a felony.

Appellant in the instant case knew he had been convicted of a felony in 1964. Appellant was mistaken as to *law* in California in regard to Penal Code section 12021 and may not have known that he would be an ex-felon notwithstanding the fact Judge Cook had struck his prior conviction. This, however, is not a defense of mistake of *fact*. Accord-

ingly, the trial court's failure to take judicial notice of certain records reflecting Judge Cook's order striking appellant's prior conviction did not preclude appellant from establishing any viable defense.

At trial Preston Callins asserted his Fifth Amendment privilege against self-incrimination and was granted immunity, but persisted in his refusal to testify although held in contempt and placed in custody during trial. The court found Callins to be "unavailable" (Evid. Code, § 240) and admitted as substantive evidence his preliminary hearing testimony. (Evid. Code § 1291.) Pursuant to Evidence Code section 1202 three prior statements by Callins were permitted to impeach portions of his testimony given at the preliminary hearing. The court instructed the jury that the statements went to Callins credibility and were not proof of the matters stated.

Appellant contends that before the preliminary hearing transcript was read to the jury, the transcript should have been edited to delete questions concerning the prior statements. Appellant argues that the admission of Callins' prior statements for impeachment purposes violated his right to confrontation. He contends that the prosecutor offered Callins' preliminary hearing testimony solely to justify subsequent introduction of incriminating inconsistent statements by Callins, ostensibly for impeachment but actually in the hope that the jury would accept them as true. Appellant further contends that as construed in *People* v. *Beyea* (1974) 38 Cal.App.3d 176, section 1202 of the Evidence Code does *not* permit the proponent of hearsay to impeach that evidence with other hearsay.

Assuming arguendo that error was committed in allowing the prosecutor to impeach Callins' preliminary hearing testimony or in failing to edit the preliminary hearing testimony, the error was harmless. (*People* v. *Watson*

(1956) 46 Cal.2d 818, 836.) The harmless error standard applies rather than the federal constitutional test. "[M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." (*California* v. *Green* (1970) 399 U.S. 149, 156.) Appellant had an opportunity to cross-examine Callins at the preliminary hearing and the prior statements of Callins were admitted solely for impeachment.

After first reaching verdicts on the possession counts, the jury acquitted on the assault charge. Because Callins' prior statements were as incriminating on the assault count as on the possession counts, the split verdicts can be explained only as reflecting the jury's determination either to disregard entirely all statements and testimony by Callins or to discredit any statement by Callins which was contradicted by another of his statements. The jury's verdicts cannot be reconciled with reliance upon Callins prior statements for any purpose. There was ample other evidence that appellant possessed the guns. The Colt Commander was found in appellant's kitchen, a loaded Colt Python was found in the master bath, and ammunition was found in appellant's nightstand.

The trial court denied probation and sentenced appellant to state prison. Prior to sentencing appellant offered evidence to prove that he honestly believed that he was not a felon in August of 1974 and that he believed he had a constitutional right to possess a gun in his home. This information was presented to the trial court at sentencing in mitigation of punishment and as a showing of unusual circumstances justifying a grant of probation. The trial court was under the impression that since appellant could have presented evidence of his honest belief that he was not a felon as a defense to the 12021 offenses, it could not

consider this evidence in mitigation. The trial court believed appellant was ineligible for probation. Appellant contends he was eligible for probation. The People concede that appellant is eligible for probation and because the trial court erroneously believed that he was not, the trial court never exercised its discretion on the question of probation. Therefore, the People recognize that the case must be remanded for resentencing.

We agree. Penal Code section 1203, subdivision (e)(6)(i) provides: "(e) Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons:

". . . . . .

"(6) Any person who has been previously convicted once in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony, if he committed any of the following acts:

"(i) Unless he had a lawful right to carry a deadly weapon at the time of the perpetration of such previous crime or his arrest for such previous crime, he was armed with such weapon at either of such times"

California Rules of Court, rule 423(a)(7) provides that a circumstance in mitigation shall include the fact that "The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal." The trial court's position may be sustained only if it is concluded that the Legislature intended by its words "unusual cases where the interests of justice would best be served" to forbid consideration on the question of probation of the very factors which must be considered in selecting the appropriate sentence. We

find nothing in the legislative history of section 1203 or in decisions interpreting the statutes supporting such a construction.

The judgment is affirmed. The case is remanded for resentencing in accordance with the views expressed herein.

I concur:

Scott, J.

Rhodes, J.*

1 Crim. No. 18996

I respectfully dissent.

In my opinion the doctrine of res judicata (collateral estoppel) is applicable to this case. To hold otherwise means an individual must continuously relitigate the validity of a prior conviction, although he has received one determination that his prior conviction is constitutionally invalid. I therefore conclude Judge Pulich was compelled to find appellant's 1964 conviction was invalid because of the earlier ruling of Judge Cook.

The general principles applicable to res judicata and specifically to collateral estoppel are set forth succinctly in *Pena-Cabanillas* v. *United States* (1968) 394 F.2d 785, 786-787, as follows: "The doctrine of collateral estoppel is an aspect of the broader principle of res judicata, [citation], and a common statement of the doctrine is that where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the

* Assigned by the Chairperson of the Judicial Council.

determination is conclusive between the parties in a subsequent action on a different cause of action. [Citations.] [¶] While expressed in varying language, the rule is that the doctrine of collateral estoppel, as applies in criminal cases, precludes the relitigation of issues determined by a former verdict and judgment, to wit, those issues actually decided and those necessarily involved in the result. [Citations.]"

"The doctrine of res judicata has been applied to final orders, or orders affecting substantial rights, which have been fully litigated and from which an appeal lies. It is applied to prevent the relitigation of issues determined by a final judgment in a prior action between the same parties." (*People* v. *Bryan* (1970) 3 Cal.App.3d 327, 339.) Judge Cook's order striking the prior conviction was an appealable order. An order striking the allegation of a prior conviction contained in an information is in substance an order setting aside a part of the information and, therefore, is an appealable order under subdivision (a)(1) of section 1238 of the Penal Code. (*People* v. *Burke* (1956) 47 Cal.2d 45, 53-54; *People* v. *Espinoza* (1979) 99 Cal.App. 3d 59, 65-67; *People* v. *Davis* (1979) 94 Cal.App.3d 215, 217-221.) Nor is there any question but that the constitutionality of the 1964 conviction was fully litigated. The 1971 ruling was made on the basis of a 116-page transcript of an evidentiary hearing on a motion to strike.

In *Hasson* v. *Cozens* (1970) 1 Cal.3d 576, plaintiff in 1965 entered a plea of guilty to a violation of section 23102 of the Vehicle Code (misdemeanor drunk driving). In 1967, plaintiff was again charged with a violation of Vehicle Code section 23102. Plaintiff represented to the court that his prior conviction was invalid because he had not been represented by counsel, had not been advised of his constitutional right to counsel and otherwise had not intelligently waived his constitutional rights. The court

accepted his representations and struck the allegation of the prior conviction. Plaintiff pled nolo contendere to the 1967 charge. The Department of Motor Vehicles suspended his license because its record showed that he suffered two convictions within seven years. (*Id.*, at pp. 578-579.) On appeal, after the trial court issued mandate against the Department of Motor Vehicles' decision, the Supreme Court ruled that the decision striking the prior conviction, not having been appealed by the People, should have been given res judicata effect by the Department of Motor Vehicles. (*Id.*, at p. 580; see also *Thomas* v. *Department of Motor Vehicles* (1970) 3 Cal.3d 335, 338; *Gonzalez* v. *Municipal Court* (1973) 32 Cal.App.3d 706, 710.)

The People assert that appellant's res judicata claim is "bold" because "a greater number of determinations" uphold the 1964 conviction. This argument ignores the fact that the doctrine of res judicata applies only to final orders and there is no prior final determination on a motion to strike adverse to appellant. The first prior adverse ruling was in 1967 and this ruling was reversed on appeal (*People* v. *Newton* (1970) 8 Cal.App.3d 359, 386-387.) The second adverse determination was by Judge Hove in July of 1971. Because the motion to strike was denied as opposed to granted, the order was not appealable. (Pen. Code, § 1237.) Since a hung jury resulted, appellant could not attack the ruling on apeal after conviction. (Pen. Code, § 1237.) The third and last adverse determination was by Judge Pulich in 1978. This last order is the subject of the instant appeal. Since the 1967 and July of 1971 orders were not subject to appeal the doctrine of res judicata does not apply to them. The November 1971 ruling of Judge Cook striking the prior as constitutionally invalid was appealable and should have been accorded collateral estoppel effect in 1978 by Judge Pulich.

Under California law a constitutionally invalid conviction will not support a 12021 offense. " 'We have repeatedly held that prior convictions obtained in violation of *Gideon* v. *Wainwright*, . . . 372 U.S. 335 . . ., cannot be used for impeachment or any other purpose. [Citations.] An accused cannot be forced to suffer anew from the earlier deprivation of his Sixth Amendment right.' " (*In re Terry* (171) 4 Cal.3d 911, 916.) The cases upon which the People and the majority rely for the proposition that appellant cannot attack the validity of his prior conviction are not in point. In *People* v. *Loomis* (1965) 231 Cal.App.2d 594, the prior was concededly valid but was set aside under a youthful offender statute after commission of the violation of section 12021. The United States Supreme Court decision in *Lewis* v. *United States* (1980) —— U.S. ——, 63 L.Ed.2d 198, 100 S.Ct. 915, was based upon the construction of a federal statute We are concerned with a state statute and state law.

I would reverse the judgment.

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White, P. J.

Appendix D, Order Denying Rehearing, People v. Newton, California Court of Appeal.

Order Denying Rehearing.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

1/Crim. No. 18996

Superior Court No. .....

People of the State of California,

Plaintiff and Respondent,

vs.

Huey P. Newton

Defendant and Appellant.

FILED

Court of Appeal—First App. Dist.
CLIFFORD P. BOWER, Clerk

By .....
Deputy

BY THE COURT:

The petition for rehearing is denied.

(White, P.J., is of the opinion that the petition should be granted.)

Dated Aug 27 1980

SCOTT, J., Acting P.J.

Appendix E, Order Denying Hearing, People v. Newton, California Supreme Court.

Order Denying Hearing.

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 3, Crim. No. 18996

IN THE SUPRERME COURT OF THE STATE OF CALIFORNIA

IN BANK

People

v.

Newton

Supreme Court

Filed

Oct 22 1980

Laurence P. Gill, Clerk

R. MCW

Deputy

Appellant's petition for hearing Denied.

Bird, C.J., Mosk, J., and Newman, J. are of the opinion that the petition should be granted.

Bird

Chief Justice

No. 80-1024

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

HUEY P. NEWTON,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in violation of Fourteenth Amendment Due Process, the State has punished the very conduct it has induced by affirmative acts reasnably relied upon by the accused.

II. Whether the federal constitution demands expansion of the collateral estoppel doctrine followed by the state courts.

III. Whether petitioner's conviction rests upon the impermissible retroactive application of Faretta v. California, 422 U.S. 806 (1975) and Lewis v. United States, 100 S.Ct. 915 (1980).

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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1980

No. 80-1024

HUEY P. NEWTON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, filed on July 28, 1980, is Appendix C to the Petition for Writ of Certiorari.

On August 27, 1980, the Court of Appeal denied petitioner's application for a rehearing.

On October 22, 1980, the California Supreme Court denied petitioner's application for a hearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

STATUTES INVOLVED

United States Constitution, Article I, section 10 (Ex Post Facto Clause);

United States Constitution, Amendment Fourteen;

California Penal Code section 12021.

STATEMENT OF THE CASE

The District Attorney of Alameda County accused petitioner Huey P. Newton of assault with a deadly weapon and by means of force likely to produce great bodily injury and of two counts of possession of a concealable firearm by one previously convicted of a felony (CT 222-224, 527). A prior

felony conviction for assault with a deadly weapon was alleged (CT 224-225).

Before trial petitioner moved to strike the prior conviction from the accusatory pleading as constitutionally invalid (CT 458-459; 482-508). After a hearing the motion was denied, the trial court declaring "I find that the defendant effectively and knowingly waived his right to an attorney." (Aug. 16, 1978 RT 27).

On the afternoon of August 16, 1974, Preston Callins, a tailor, was found on the sidewalk outside an Oakland apartment (RT 106-107, 111-112). He had suffered six depressed skull fractures and about a dozen lacerations (RT 116-119). Callins was discovered by a neighbor who "couldn't tell who it was, he was so badly beaten up." (RT 107).

The police were summoned. Callins told the responding officer that he had gone

to petitioner's apartment for tailoring and angered petitioner, whereupon petitioner had beaten him on the head with a pistol (RT 182-183, 185).

The victim's fingerprints were found in petitioner's penthouse apartment (RT 200, 243, 256, 282-285, 288-292), as were several carpet blood stains consistent with Callins' blood type, A (RT 120, 237-239, 249-250, 301-302).

A warrant search of petitioner's apartment disclosed two pistols, a loaded .45 caliber semi-automatic found in a kitchen drawer (RT 213, 232), and a loaded .357 magnum revolver found in a drawer in the master bedroom bath (RT 231). The revolver bore traces of type A human blood and of hair (RT 211, 299). The wooden grips of the revolver appeared broken; matching wood chips were discovered on petitioner's carpet (RT 207, 211-212, 229). Fifty-one .357 rounds,

twenty-one .38 rounds, and six shotgun shells were found on the bedroom nightstand (RT 233).

It was stipulated that "on or about the 8th day of October, 1964 in the Superior Court of California, in and for the County of Alameda, the defendant Huey Percy Newton was convicted of a felony." (RT 838).

At trial, victim Preston Callins claimed his Fifth Amendment privilege against self-incrimination, was granted immunity, but persisted in his refusal to testify although jailed for contempt during petitioner's trial (RT 324-338, 341-361, 855).

A jury found petitioner guilty of two counts of possession of a concealable firearm by a person previously convicted of a felony but not guilty of the charged assault (CT 649-653).

Thereafter, the trial court concluded that petitioner was ineligible for probation

as a matter of law (RT 1246-1247), and sentenced him to state prison for two years (CT 923). On appeal, the State conceded that petitioner was eligible for probation. The Court of Appeal agreed and remanded the case to the trial court for resentencing. Petition, 11a-12a.

ARGUMENT

I

PETITIONER'S CONVICTION IS CONSISTENT WITH FOURTEENTH AMENDMENT DUE PROCESS.

Shuttling between procedural and substantive due process, petitioner insists that his conviction offends the Fourteenth Amendment because it was "obtained with no notice to him that his conduct was proscribed, affirmative acts by the State to lead him to believe that his conduct would be permitted, and finally with no requirement of proof of intent despite California's requirement of such." Petition, 8.

Recognizing that "this Court has never articulated a general constitutional doctrine of mens rea," Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion), petitioner maintains that although "it has been specifically held that [California Penal Code] § 12021 requires proof of wrongful intent," he was convicted "without proof of any knowledge or wrongful intent." Petition, 7-8. His argument says the same thing three different ways; it is premised upon a misapprehension of federal and state law.

Federal cases interpreting 18 U.S.C. App. § 1202(a) establish that possession of firearms generally may be punished without regard to mens rea. "[W]hen a statute prohibits possession, mens rea or scienter is not necessary." United States v. Crow, 439 F.2d 1193, 1195 (9th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972). Accord, United States v. Quiroz, 449 F.2d 583, 585

(7th Cir. 1975). Cf. United States v. Freed, 401 U.S. 601, 607-610 (1971). "It has been consistently held that, while a felon must knowingly possess the gun to be convicted, he need not be aware that such possession is illegal [Citations], nor even be aware he is a felon . . . ." United States v. Sneed, 353 F.Supp. 280, 284 (D.Md. 1973). From these decisions we infer that a state may, constitutionally, penalize possession of concealable firearms by convicted felons without proving unlawful intent. Broadly speaking, California does so: "'The only knowledge required is knowledge of the character of the object possessed; knowledge that the possession is illegal is unnecessary.'" People v. Howard, 63 Cal.App.3d 249, 256, 133 Cal.Rptr. 689, 693 (1976).

However, petitioner claims that he was denied the benefit of an earlier decision, People v. Bray, 52 Cal.App.3d 494, 124

Cal.Rptr. 913 (1975), which demands proof of wrongful intent. Petition, 8. He does not claim invidious discrimination in the application of state law. On the contrary, he urged the California Supreme Court to grant his petition for hearing because another court in another case had committed the same state law error.[1/] Good faith misapplication of state law does not, at course, state a Fourteenth Amendment claim. Beck v. Washington, 369 U.S. 541, 554-555 (1962).

The basis of petitioner's mens rea argument is his misunderstanding of the scope of Bray. While section 12021 does not so nearly impose strict liability as does

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1. "However, the fact that the [People v.] Jesse [159 Cal.Rptr. 654 (1979)] court and the Court of Appeal in this case pursued an identical approach within a short period of time with reference to the same problem indicates that the issue is a recurring one productive of great confusion and in need of resolution by this Court." Petition for Hearing, 9.

federal law, Bray does not go nearly so far in recognizing lack of knowledge as an affirmative defense as petitioner would have this Court believe. In Bray the defendant previously had been convicted in Kansas for a crime the California prosecutor was uncertain constituted a felony. Thereafter, upon full disclosure of the circumstances of the Kansas conviction, Bray was registered by the Bureau of Collection and Investigative Services as a guard or patrolman and permitted to purchase a gun. In short, the State told Bray he could do the very act later prosecuted: possess a gun. Cf. Cox v. Louisiana, 379 U.S. 595, 571 (1964); Raley v. Ohio, 360 U.S. 423, 438 (1959). In permitting Bray to assert a mistake of fact defense, the court narrowly confined its holding:

> "This decision should not be interpreted to mean instructions on

mistake or ignorance of fact and knowledge of the facts are required every time a defendant claims he did not know he was a felon. Here Bray had been convicted in Kansas of what for California is an unusual crime, 'accessory after the fact' and even the prosecutor claimed difficulty in knowing whether it was a felony. In addition, Bray on more than one occasion had been led to believe by state regulatory agencies he was not a felon: he was allowed to vote, he was registered in an occupation allowing him to carry a gun, and he was allowed to buy and register the gun. Throughout the trial. Bray laid the proper foundation for the instructions and he requested them. It is only in very unusual circumstances such as these that the

giving of these instructions is necessary." 52 Cal.App.3d at 499; 124 Cal.Rptr. at 917.

As did the court reviewing appellant's conviction, other California courts have perceived the narrow limits of Bray. People v. Howard, supra; People v. Norton, 80 Cal.App.3d Supp. 14, 146 Cal.Rptr. 343 (1978). Under California cases the ignorance of fact or law defense, which introduces the element of wrongful intent, is available only when the defendant shows justifiable reliance upon the acts of the State. See People v. Norton, 80 Cal.App.3d Supp. at 24; 146 Cal.Rptr. at 349.

A state may not punish the very conduct which it has induced by its affirmative acts, reasonably relied upon by the accused. See Kratz v. Kratz, 477 F.Supp. 463 (E.D.Pa. 1979) and cases collected therin. Petitioner

points to several state actions which he urges justified his belief that he was no longer a convicted felon and, therefore, was permitted to possess concealable weapons. Given the reasoning of the appellate court below, we consider each such affirmative action. It is appropriate to note, however, that petitioner presented the bulk of these matters not as a defense but in mitigation of sentence. The trial court - mistakenly - would have permitted the defense.[2/]

Petitioner claims justifiable reliance upon two judicial orders striking his prior conviction from indictments. The

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2. At sentencing the trial judge declared:

> "I can't allow it, because, as you know, that was a defense. He could have said Judge Cook told me that that had been set aside . . . . I noticed during the course of trial that Mr. Garry was in the courtroom. I thought he was going to talk about that. But he was not called as a witness." RT 1226. See also RT 1227.

first occurred in 1971, following two previous orders refusing to strike the prior from the same murder indictment. On its face, Judge Cook's 1971 order striking the prior does no more than excise it from an accusatory pleading.

The order declared:

> "defendant may have waived his right to counsel at that time time without an intelligent conception of the consequences of his act."
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> * * *
>
> "For this reason the charge of prior conviction must be stricken from the indictment."

California law had long held, as it does today, that "a court order finding a prior conviction to be constitutionally invalid and striking the alleged prior conviction from the accusatory pleading in a

pending criminal proceeding does not have the effect of wiping out the prior judgment of conviction . . ." Gonzales v. Municipal Court, 32 Cal.App.3d 706, 711, 108 Cal.Rptr. 612 (1973). Accord, People v. Coyle, 88 Cal.App.2d 967, 973-974, 700 P.2d 546, 551 (1948), quoted in People v. Burke, 47 Cal.2d 45, 51, 301 P.2d 241, 245 (1956).

In 1978, a magistrate dismissed a charge of possession of a firearm by an ex-felon, brought against petitioner. The magistrate erroneously believed himself bound by Judge Cook's 1971 order. Petition, 4. Apart from the fact that the magistrate lacked jurisdiction to act, as a matter of state law, People v. Peters, 21 Cal.3d 749, 581 P.2d 651 (1978); People v. Municipal Court (White), 88 Cal.App.3d 206, 151 Cal. Rptr. 861 (1979), this "affirmative state action" occurred some four years after the possession charged in this case.

Attributing to judicial orders significance far beyond that attached by state law is neither reasonable nor justifiable reliance. That petitioner may have been misinformed by his attorney, Charles Garry, about his right to possess weapons, does not alter the situation. It is hornbook law in California that

> "The defense of action taken in good faith, in reliance upon the advice of a reputable attorney that it was lawful, has long been rejected. The theory is that this would place the advice of counsel above the law, and would also place a premium on counsel's ignorance or indifference to the law." Witkin, 1 California Crimes, 143-144 (1963 ed.).

For due process purposes, it is important to note that the rigor of this rule is relaxed by the availability of two remedies, motion to vacate and writ of habeas corpus, by which

petitioner could have attacked the validity and continued existence of his prior conviction. Petitioner's statement that he "could not have known, even after exercising the utmost care," of his ex-felon status is simply untrue. Petition, 6.

Petitioner emphasizes that since 1971 the State has permitted him to vote. The action of the voting registrar afforded no basis for the belief that the State no longer regarded petitioner as a convicted felon. For over a century California Constitution, Article II, Section 1 provided ". . . no person convicted of any infamous crime . . . shall ever exercise the privilege of an elector in this State." Until 1966, the disqualifying language "infamous crime" was judicially interpreted to include conviction of any felony. Flood v. Riggs, 80 Cal.App.3d 138, 145, 145 Cal.Rptr. 573, 576 (1978). In Otsuka v. Hite, 64 Cal.2d 596,

414 P.2d 412 (1966), however, under the felt compulsion of the Fourteenth Amendment Equal Protection Clause, the California Supreme Court construed the State constitutional provision as disenfranchising only those convicted of "crimes involving moral corruption and dishonesty . . . [constituting] a threat to the integrity of the elective process." 64 Cal.2d at 599; 414 P.2d at 414. Assault with a deadly weapon, petitioner's prior offense, hardly fell within that category. In March, 1973, our state high court re-examined its Otsuka interpretation of the constitutional provision (substantially re-enacted as Article II, section 3), in light of evolving federal equal protection principles, and invalidated the suffrage bar as to former felons. Ramirez v. Brown, 9 Cal.3d 199, 597 P.2d 1345 (1973). In June, 1974, this court reversed that decision. Richardson v. Ramirez, 418 U.S. 24 (1974). The California

Supreme Court found this court's remand moot in light of an intervening amendment of the state charter, Ramirez v. Brown, 12 Cal.3d 912, 528 P.2d 378 (1974), which now provides in Article II, section 4:

> "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for conviction of a felony."

Ex-felons are enfranchised in California.

Petitioner confuses ballots and bullets; the voting registrar did not tell petitioner he could carry a gun or even that he no longer was an ex-felon, but merely that a conviction for assault with a deadly weapon did not threaten the integrity of the elective process.

Petitioner alludes to the decision of the Superintendent at the California

Medical Facility at Vacaville to permit him to visit an inmate. Since both the applicable state statute (California Penal Code section 4571) and the then-effective prison administration regulation (Director's Policy 2705) permitted ex-felons to visit at the discretion of the warden or superintendent, the superintendent's determination did not reflect upon petitioner's status as a convicted felon.

Finally, petitioner complains that he could have been, but was not, charged with violating Penal Code section 12021 in 1972 and in 1974. The record does not disclose the basis on which the prosecutor exercised his discretion in either case. Assuming that the charging deputy district attorney was aware of petitioner's 1964 conviction, it may have been thought that the circumstances of the 1972 offense warranted only a misdemeanor charge, as was alleged. Nor does the record

illuminate the 1974 charging determination which may have involved a tactical decision to avoid encouraging a compromise verdict. The reconsideration of the accusation in the instant case is not attributable to the intervening decision in Faretta v. California, 442 U.S. 806 (1975), but to the change in petitioner's fugitive status. Given the variety of factors influencing prosecutional discretion in charging crimes, a state cannot be constitutionally compelled to choose between immediately condemning conduct or forever condoning it. Finally, it is difficult to regard seriously petitioner's claim of reliance on the omissions of the district attorney. After all, the admitted 1972 possession occurred before the 1972 or 1974 charging decisions.

We find nothing in the actions of the State of California which estop it from penalizing petitioner's present possession.

Nor do we find such estoppel constitutionally compelled. Our view is reinforced by the availability of judicial procedures whereby petitioner could have contested the continued validity of his prior conviction.

II

THE CONTOURS OF CALIFORNIA'S COLLATERAL ESTOPPEL DOCTRINE ARE NOT DICTATED BY THE FEDERAL CONSTITUTION

For the first time petitioner urges that his collateral estoppel theory, rejected as a matter of state law, must be accepted as constitutionally compelled.[3/] At the outset of petitioner's August 16, 1978, hearing on his motion to strike the prior conviction, the trial judge, referring to the 1971 ruling striking the prior, inquired:

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3. An examination of petitioner's Opening Brief (28-33) and Reply Brief (39-53) in the California Court of Appeal and his Petition for Hearing (20-27) in the California Supreme Court, reveals that this argument has only now acquired federal overtones.

"Are you saying that in any way is res judicata in this action?

Defense counsel replied:

"MR. STEEL: I am not saying that there is res judicata applicable to a motion to strike at all. I don't think that it applies to the prosecution or to the defense and I think that Gonzales versus Municipal Court establishes that." August 16, 1978 RT 1-2.

Having lost his trial court challenge to the constitutional validity of the 1964 conviction, on appeal petitioner sought refuge in the collateral estoppel doctrine which, he belatedly claimed, prevented reconsideration of the 1971 order. Petitioner's failure to assert the bar of res judicata in the trial court could have been held a waiver. Dillard v. McKnight, 39 Cal.2d 209, 209 P.2d 387 (1949), Cf. Wainwright v. Sykes,

433 U.S. 72 (1977). Instead, the California Court of Appeal rejected his claim on the merits as a matter of state law. Petition 7a. Cf. Sumner v. Mata, 101 S.Ct. 764, 769 (1981). However, petitioner did not claim in that or any state court that "principles of double jeopardy and due process" Petition, 9, prevented use of his prior conviction as an element of the present offenses. That failure ends inquiry here. Beck v. Washington, 369 U.S. 541, 550 (1962); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

The notion that the federal Constitution requires that states accord res judicata effect to motions to strike prior convictions from specific pleadings is startling. Convicted in 1964 of assault with a deadly weapon, petitioner was tried three times on felony charges under a 1967 indictment. Each time petitioner moved to strike his prior conviction; he failed twice,

succeeding only in his last attempt, in 1971. Petition, 5a-6a. Then the court ordered that the "prior conviction must be striken from the indictment" because petitioner "may" have ineffectively waived counsel. When petitioner's third trial ended in a hung jury, the prosecutor determined not to proceed further against petitioner.

Because under state law the order striking the prior from the indictment had no significance apart from the proceeding in which it was entered, the prosecutor had no reason to appeal. Moreover, existing state decisional law held that by reason of the mistrial, the striking order was unappealable. People v. Bryan, 3 Cal.App.3d 327, 339, 83 Cal.Rptr. 291, 299 (1970). Had such an appeal been pursued, petitioner with good reason could have claimed harassment by an unsuccessful prosecutor insisting that an appellate court resolve a by-then moot

question.

Petitioner now contends that the county prosecutor was forced to appeal or to bind the state forever for all purposes by the trial court's ruling on his motion to strike. The absurdity of this suggestion is evident considering that a principal purpose of the collateral estoppel doctrine is judicial economy. Standefer v. United States, 100 S.Ct. 1999, 2006-2007 (1980). California appellate courts have more urgent business than deciding whether trial courts have correctly striken priors from discontinued prosecutions.[4/] Worse, the principal goal of the res judicata doctrine, to spare parties unnecessary litigation, would be frustrated.

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4. The substantial impact in state courts of petitioner's proposed constitutional rule is reflected in statistics regarding invalidated priors supplied in People v. Davis, 94 Cal.App.3d 215, 220 n. 1, 156 Cal.Rptr. 395, 399 n. 1 (1979).

An essential element of the res judicata or collateral estoppel doctrine is identity of issues. Hight v. Hight, 67 Cal.App.3d 498, 136 Cal.Rptr. 685 (1977). Underlying this requirement is an equal dignities motion: conclusive effect should not be given a judgment where the incentive to litigate the issue was substantially less than in the present proceeding. It is unfair to attach consequences to a judgment far exceeding those foreseen by the litigants at the time. A prosecutor who in 1967 alleges a prior conviction for sentence enhancement purposes has much less reason to challenge a striking order than does the prosecutor who in 1977 seeks to prove the stricken prior as an element of the charged offense. Certainly, neither petitioner nor the state had reason to believe in 1971 that Judge Cook's order, contrary to two earlier rulings, would be res judicata. Indeed, petitioner did not

think that as late as August 16, 1978, when in unequivocal terms defense counsel disavowed reliance on the res judicata doctrine.

The federal Constitution does not so far intrude into the administration of state courts as to dictate what subsequent effect must be given to orders striking prior convictions from accusatory pleadings.

III

PETITIONER'S CONVICTION DOES NOT REST UPON THE RETROACTIVE APPLICATION OF DECISIONS OF THIS COURT

United States Constitution, Article I, section 10, forbids state legislatures from enacting ex post facto laws, which retroactively enlarge criminal liability or increase punishment. "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the

same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964). Petitioner contends that his conviction rests upon the state courts' retroactive application of this Court's decisions in Faretta v. California, 422 U.S. 806 (1975) and Lewis v. United States, 100 S.Ct. 915 (1980). The claim is unabashed nonsense.

Lewis held that 18 U.S.C. App. § 1202(a)(1) "prohibits a felon from possession a firearm despite the fact that predicate felony may be subject to the collateral attack on constitutional grounds." 100 S.Ct. at 921. Petitioner states that in reaching the same conclusion under California Penal Code section 12021, "it is apparent from the face of the District Court of Appeal decision that it simply abandoned applicable California state law in light of Lewis." Petition, 13. This misrepresentation insults even the casual reader of the opinion below.

Instead of following Lewis, the Court of Appeal adhered to its own decision, rendered in 1965 in People v. Loomis, 231 Cal.App.2d 594, 597, 47 Cal.Rptr. 124, 126 (1965). The Court of Appeal held as follows:

> "Under appellant's argument Judge Pulich was bound to find the 1964 conviction constitutionally invalid because of the earlier rulings of Judges Cook and Kelsay. However, this argument presupposes that a defendant charged with a violation of Penal Code section 12021 may raise as a defense the validity of the underlying prior felony conviction. A defendant may not raise such a defense. 'Appellant's status at the time he possessed the gun is the critical issue.' (People v. Loomis (1965) 231 Cal.App.2d 594, 597; see also Lewis v. United States

(1980) ____ U.S. ____, 63 L.Ed.2d 198, 100 S.Ct. 915.)" Petition, 7a. "Appellant's status at the time he possessed the gun is the critical issue," is language from Loomis, not Lewis. Indeed, regarding Lewis the State argued

> "The intent of Congress tells little about the intent of our Legislature in enacting Penal Code section 12021. No further guidance on that subject is required, however, than is provided by this Court's opinion in People v. Loomis . . . ." Respondent's letter of May 1, 1980, p. 3.

The California Court of Appeal's interpretation of Penal Code section 12021 moots petitioner's claim that his prior conviction was preserved as an element of his present offense only by the impermissible retroactive application of Faretta. As the

Court of Appeal explained:

> "Appellant also contends before this court that his 1964 conviction is constitutionally invalid. But it is unnecessary for this court to address this issue because as noted above the invalidity of the prior may not be attacked after the possession has occurred." Petition, 8a.

Some think Faretta must be applied retroactively, People v. Holcomb, 235 N.W.2d 343, 347 n. 7 (Mich. 1975); others think differently, People v. McDaniel, 16 Cal.3d 156, 168, 127 Cal.Rptr. 467, 474 (1976). Appellant's conviction does hinge upon the answer to this question, however. Further, ex post facto and due process concepts are not offended by application of a decision recognizing the very right petitioner insisted upon in 1964. Faretta did not expand criminal liability or aggravate punishment.

CONCLUSION

For the stated reasons the People of the State of California respectfully urge this Court to deny the petition for writ of certiorari.

Dated: February 27, 1981.

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